

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:SB:1:BUF:GL-118708-02

ADMelzer

date: **APR 16 2002**

to: Kenneth Scholz, Group 10 Manager

from: Associate Area Counsel SB/SE, Buffalo

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subject: Revisions to Uniform Commercial Code

This writing may contain privileged information. Any unauthorized disclosure of this writing may have adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated March 19, 2002. This memorandum should not be cited as precedent. The six issues/questions presented in your memorandum are addressed herein.

**Question:** What is the legal reference regarding the state in which a UCC-1 should be filed against a corporation?

**Answer:** Section 9-307 of the Uniform Commercial Code (McKinney's 2001) ("UCC") defines the "location of debtor." A debtor who is an individual is located at the individual's principal residence. A debtor organization with only one place of business is located at its place of business. A debtor organization with more than one place of business is located at its chief executive office. Under UCC § 9-307(E), a registered organization that is organized under the law of a state is located in that state. Hence, a corporation's location is its state of incorporation or "registration."

**Question:** If a New York lending institution makes a secured loan to a Delaware corporation, is the UCC-1 filing required in New York as well as Delaware?

**Answer:** Under UCC § 9-301, the laws of New York govern when a debtor is located in New York (see above), collateral, as defined in § 9-102(A)(12), is located in New York, a wellhead or minehead is located in New York, the interest is a cooperative interest, and when negotiable documents, goods, instruments, money, or tangible chattel paper is located in New York. Normally, when the

corporation incurring the debt is "located" in Delaware, Delaware's law governs perfection and priority of the security interest. Hence, the proper place to file the UCC-1 is Delaware.

However, the proper place of filing is not clear in the situation where a corporation is "located" in Delaware, but the collateral or negotiable instrument is located in New York. The courts will eventually have to settle the issue of which law governs and where the UCC-1 has to be filed. For the time being, the creditor will probably file in just the state of incorporation or with the Secretaries of State in both New York and the state of incorporation. We recommend that revenue officers continue to check both the New York and state of incorporation records for such filings and those filings which predate the new changes. Also, we recommend that the revenue officers request separate searches for any d/b/a or a/k/a names of the corporate taxpayer as well as any related organizations (i.e. a subsidiary or parent corporation).

**Question:** Has the location for filing of the Notice of Federal Tax Lien ("NFTL") been affected in any way by the revised UCC provisions?

**Answer:** The changes to Article 9 will not affect the location for filing notices of federal tax lien. Internal Revenue Code § 6323(f) and the regulations thereunder provide rules with respect to the place for filing the notice of federal tax lien against real and personal property. Revised § 9-109(C)(1) specifically states that the revision does not apply to the extent that "a statute, regulation, or treaty of the United States preempts this article..." The filing of the NFTL's is governed by I.R.C. § 6323 as opposed to the UCC. See I.R.C. § 6323(f)(5). In the 41 states that have adopted the Uniform Federal Lien Registration Act, the Act follows I.R.C. § 6323 and refers to the UCC as background. The remaining nine other states have adopted laws that likewise comply with I.R.C. § 6323(f).

Hence, for the tax lien to attach to real property, the NFTL is filed in the office of the clerk of the county in which the property is situated, except if the property is situated in the counties of Kings, Queens, Bronx, or New York. Then, the place for filing shall be in the office of the City Register of the City of New York in such county. New York Lien Law § 240.1 (McKinney's 1973). To attach to the personal property of a corporation or partnership, the NFTL is filed in the Office of the Secretary of State. New York Lien Law § 240.2(a). To attach to the personal property of all other taxpayers, the NFTL must be filed in the office of the clerk of the county where the taxpayer resides at the time of the filing, except if the taxpayer resides in the counties of Kings, Queens, Bronx, or New York. Then, the place for filing

shall be in the office of the City Register of the City of New York in such county. New York Lien Law § 240.2(b).

**Question:** Must the Service comply with revised Section 9 provisions regarding the taxpayer names as written on NFTL's?

**Answer:** Revised UCC Section 9 provides strict rules in identifying debtors on the filed financing statements. Internal Revenue Code § 6323(f)(3) dictates that the form and content of the Notice of Federal Tax Lien be prescribed by the Secretary of the Treasury. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien. However, conformity with the revised UCC provisions ensures that any interested party will locate the Service's tax liens. This eliminates unnecessary lawsuits by third parties buying property without "notice" of the tax lien. We recommend that the revenue officers not include any name other than the legal name of the taxpayer on the front of the NFTL. If a business is routinely known by another name, the revenue officer could provide the debtor's trade name as a second debtor or file an additional NFTL under the other name (i.e. the d/b/a or a/k/a name).

**Question:** Does a creditor file a UCC-1 against a partnership under the name of the partnership or the individual partners?

**Answer:** Your memorandum raises the issue of filing financing statements against partnerships, as opposed to the individual partners. This information is critical to revenue officers conducting searches against a partnership taxpayer. Under UCC § 9-503(A)(4), as long as the debtor partnership has a name, the filed document must provide the legal name of the partnership. Only where the debtor partnership does not have a name should the document list the names of the partners. Hence, a revenue officer should search under the legal name of the partnership, and a NFTL need not list the partners' names.

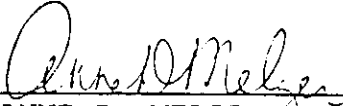
**Question:** Must a secured creditor file an "in lieu of" filing in order to continue the perfection of its security interest?

**Answer:** The last issue raised in your memorandum regards the effectiveness of filings made before revised Article 9 took effect. Under UCC § 9-705, any financing statement properly filed in a county clerk's office prior to the revisions, which would now be properly filed in the Secretary of State's office or in another state, remains effective until "the earlier of: (1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or (2) June 30, 2006." UCC § 9-705(C).

If within such time a continuation statement becomes due for filing, an initial financing statement with appropriate cross-references to the original can be filed with the Secretary of State "in lieu of" the continuation. UCC § 9-706. Hence, it is vital that the revenue officers continue to check the county records as well as the Secretary of State's records, and in some cases, those of the state of incorporation or registration of a business.

Having rendered our opinion, we are closing our file. Any additional questions can be directed to me at (716) 551-5614, ext. 30. Thank you for your cooperation in this matter.

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By:   
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